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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 266

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

JAMES W. MCELVAIN AND FRANK CROZIER

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF ON BEHALF OF THE UNITED STATES

OPINION OF THE COURT BELOW

No opinion was delivered by the District Court for the Northern District of Illinois from which this case comes. The judgment and certificate of that court, however, appear at pages 10–11 of the record.

JURISDICTION

This case is before this Court on direct writ of error sued out on December 16, 1925 (R. 11), under the Criminal Appeals Act of March 2, 1907 (Ch. 2564, 34 Stat. 1246), to review a judgment of the District Court for the Northern District of Illinois,

filed December 16, 1925 (R. 10), sustaining separate pleas in bar entered by defendants (R. 6–7) to an indictment for conspiracy to defraud the United States (R. 1–5), overruling demurrers filed by the United States to said pleas (R. 9–10) and dismissing the proceedings.

The Criminal Appeals Act of March 2, 1907, *supra*, permits a direct writ of error to be taken on behalf of the United States—

> From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The separate pleas entered by defendants are variously denominated in the record. In the judgment they are referred to as pleas in bar, but in the judge's certificate and elsewhere in the record they are referred to as pleas in abatement.

The pleas themselves set up that the indictment was not found, nor information instituted, within three years next after the commission of the offense charged, nor within three years after any overt act charged in the indictment; that the defendants were not absent from the district from the time of the commission of the offense charged to the date of the return of the indictment, and have never been fugitives from justice. (R. 6–7.) The judgment of the court sustaining these pleas makes no reference to the statute of limitations; but in a certificate filed on the same date, December 16, 1925 (R. 11), the judge certifies that in entering

judgment he was of the opinion that at the time the indictment was returned the offense charged therein was barred by the statute of limitations; and that no question of an interpretation of the indictment was involved in his decision.

Under these circumstances it is immaterial how the pleas entered by defendants are denominated in the record. In *United States* v. *Barber,* 219 U. S. 72, this Court held that a judgment dismissing an indictment on the ground of the statute of limitations was a judgment sustaining a special plea in bar, and that the name given by counsel to the plea could not alter its nature. In *United States* v. *Rabinowich,* 238 U. S. 78, the record shows the defense was raised by a motion to quash and by a plea in abatement. This Court treated the motion and the plea as amounting to a special plea in bar.

There can be no question, therefore, but that this Court has jurisdiction in the case at bar.

QUESTION PRESENTED

Does the six-year period of the statute of limitations prescribed in the Act of November 17, 1921 (Ch. 124, 42 Stat. 220), apply to conspiracy to defraud the United States of income and profits taxes in violation of Section 37 of the Penal Code?

The court below held that it does not. The Government claims this holding is erroneous.

STATEMENT

On October 3, 1924, James W. McElvain, Frank Crozier, and Carley H. Hoy were indicted in the Northern District of Illinois for conspiracy to defraud the United States, in violation of Section 37 of the Penal Code.

The indictment was returned more than three years, but less than six years after the date of the last overt act charged.

The indictment (R. 1–5) sets forth the conspiracy at full length. In substance it charges that McElvain and Hoy were president and manager, respectively, of the Freeman Coal Mining Company, an Illinois corporation, and that Crozier was employed as attorney for the corporation, which was one required by law to file an income and profits tax return for the calendar year ended December 31, 1920; that defendants conspired and agreed together that they would prepare and cause to be prepared an incorrect, false, and fraudulent income and profits tax return for said calendar year on behalf of said corporation; that such fraudulent return was in fact prepared, sworn to by James W. McElvain as president of said corporation, and filed on March 14, 1921, with the Collector of Internal Revenue for the Eighth Collection District of Illinois in pursuance of the conspiracy, thereby defrauding the United States out of taxes to the amount of $54,680.10. Falsification of the books of the corporation for the purpose of concealing true

income was also charged as a part of said conspiracy. The indictment sets forth eight overt acts done by defendants in furtherance of their conspiracy.

On February 9, 1925, defendants were arraigned and each of them entered a plea of "not guilty" to the indictment. (R. 5.) On October 23, 1925, defendants James W. McElvain and Frank Crozier filed separate pleas in bar (R. 6–7) contending that the United States should not further prosecute the indictment against them because it was not found, nor information instituted, within three years after the commission of the offense charged therein. On December 16, 1925, the Government demurred to each of these pleas. (R. 9–10.)

On the same date the District Court entered judgment overruling the Government's demurrers, sustaining the pleas in bar entered by defendants, and dismissing the proceedings. (R. 10.) No reference to the statute of limitations is made in this judgment. However, by certificate (R. 11) filed on the same date that judgment was entered, the District Judge certified that, in entering his order dismissing the proceedings, he was of the opinion that at the time the indictment was returned the offense charged therein was barred by the statute of limitations and that no question of an interpretation of the indictment was involved in his decision.

From the judgment of the District Court the Government, on December 16, 1925, sued out this writ of error direct to this Court, under the Act of March 2, 1907 (Ch. 2564, 34 Stat. 1246), upon the ground that the court below had erroneously construed the statutes of limitations involved.

STATUTES INVOLVED

Section 37 of the Penal Code, under which this indictment was found, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.

Neither the judgment of the court (R. 10) nor the judge's certificate (R. 11) makes specific reference to the particular statute of limitations under which the court held the prosecution to be barred. It will be necessary, therefore, to set forth the several statutes of limitations to which reference was made at the hearing on the pleas in the court below.

The Act of November 17, 1921 (Ch. 124, 42 Stat. 220), amending Section 1044 of the Revised Statutes, provides—

That section 1044 of the Revised Statutes of the United States be amended so as to read as follows:

"SEC. 1044. No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided, however,* That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws."

SEC. 2. That this Act shall be in force and effect from and after the date of its passage.

(Revised Statutes 1046, referred to in the above-quoted Act, relates to offenses arising under *revenue* laws, and is not pertinent to the question here at issue.)

Section 1321 of the Revenue Act of 1921 (Ch. 136, 42 Stat. 227, 315), provides:

(a) That the Act entitled "An Act to limit the time within which prosecutions may be instituted against persons charged with vio-

lating internal revenue laws," approved July 5, 1884, is amended to read as follows:

"That no person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense: *Provided,* That the time during which the person committing the offense is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings: *Provided further,* That the provisions of this Act shall not apply to offenses committed prior to its passage: *Provided further,* That where a complaint shall be instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district: *And provided further,* That this Act shall not apply to offenses committed by officers of the United States."

(b) Any prosecution or proceeding under an indictment found or information instituted prior to the passage of this Act shall not be affected in any manner by this amendment, but such prosecution or proceeding shall be subject to the limitations imposed by law prior to the passage of this Act.

The Act of July 5, 1884, was further amended by Section 1010 of the Revenue Act of 1924 (Act of

June 2, 1924, Ch. 234, 43 Stat. 253, 341), to read as follows:

(a) The Act entitled "An Act to limit the time within which prosecutions may be instituted against persons charged with violating internal-revenue laws," approved July 5, 1884, as amended, is amended to read as follows:

"That no person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal-revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense: *Provided*, That for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, the period of limitation shall be six years, but this proviso shall not apply to acts, offenses, or transactions which were barred by law at the time of the enactment of the Revenue Act of 1924: *Provided further*, That the time during which the person committing the offense is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings: *Provided further*, That the provisions of this Act shall not apply to offenses committed prior to its passage: *Provided further*, That where a complaint shall be instituted before a commissioner of the United States within the period above lim-

ited, the time shall be extended until the discharge of the grand jury at its next session within the district: *And provided further,* That this Act shall not apply to offenses committed by officers of the United States."

(b) Any prosecution or proceeding under an indictment found or information instituted prior to the enactment of the Revenue Act of 1921 shall not be affected in any manner by this section, nor by the amendment by the Revenue Act of 1921 of such Act of July 5, 1884, but such prosecution or proceeding shall be subject to the limitations imposed by law prior to the enactment of the Revenue Act of 1921.

SPECIFICATION OF ERROR TO BE URGED

The District Court erred in failing to hold that the case falls within the six-year period of limitations prescribed by the Act of November 17, 1921 (Ch. 124, 42 Stat. 220), for all offenses "involving the defrauding or attempts to defraud the United States * * * whether by conspiracy or not," and erred in sustaining the pleas in bar.

SUMMARY OF ARGUMENT

The offense charged under Section 37 of the Penal Code in this case does not arise under the internal revenue laws but under the general criminal laws of the United States. Defrauding the United States is an ingredient of the offense. Therefore the six-year period of limitations prescribed in the Act of November 17, 1921, applies.

There is no merit to the contention that that Act was intended by Congress to apply only to offenses growing out of the World War. The Act plainly on its face includes the offense herein charged and there is no need for resort to construction. Section 1010 of the Revenue Act of 1924 is not applicable to the offense here involved, as it is limited to offenses arising under the internal revenue laws. It is therefore unnecessary for this Court to attempt to reconcile the apparently conflicting provisions of that section.

This case in all of its angles is controlled by the recent case of *United States* v. *Noveck,* decided May 10, 1926, 46 S. Ct. 476.

ARGUMENT

I

THE SIX-YEAR PERIOD OF LIMITATIONS PRESCRIBED BY THE ACT OF NOVEMBER 17, 1921, AND NOT THE THREE-YEAR PERIOD IN SECTION 1321 OF THE ACT OF 1921, APPLIES TO THE CRIME OF CONSPIRACY TO DEFRAUD THE UNITED STATES IN ITS INTERNAL REVENUE, IN VIOLATION OF SECTION 37 OF THE PENAL CODE

In view of the plain language of the Act of November 17, 1921, *supra,* and the decision of this Court in *United States* v. *Noveck,* decided May 10, 1926, 46 S. Ct. 476, it is so obvious that the ruling of the court below is erroneous that the Government's discussion of the question will be quite brief.

Defendants in error were indicted under Section 37 of the Penal Code for conspiracy to defraud the United States in its internal revenue. The indictment was found October 3, 1924—more than three but less than six years after March 14, 1921, the date of the commission of the last overt act charged. At the time of the commission of the offense three years was the period of limitations for offenses "arising under the internal revenue laws." (Act of July 5, 1884, ch. 225, 23 Stat. 122, later reenacted and amended by Section 1321 of the Revenue Act of 1921 and Section 1010 of the Revenue Act of 1924.) At the same time the period of limitations for all crimes not capital arising under the general criminal laws (Section 1044 Revised Statutes) was likewise three years. However, before three years had elapsed after the commission of the offense the Act of November 17, 1921, *supra,* amended Section 1044 of the Revised Statutes and extended the period of limitations to six years for "offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not * * * and now indictable under any existing statutes." At the time of the enactment of the Act of November 17, 1921, the offense charged was indictable under existing statutes. Defendants pleaded in bar that the indictment was not found within three years after the commission of the offense charged, which pleas the court below sustained.

In the absence of anything in the record to disclose the reasoning by which the court held that prosecution was barred, it must be assumed that the pleas were sustained either on the ground (1) that the case fell within the three-year period of limitations prescribed in Section 1321 of the Revenue Act of 1921, *supra,* or (2) that Congress intended the Act of November 17, 1921, *supra,* to apply only to those frauds against the Government arising out of the war. Both of these grounds are untenable.

The recent case of *United States* v. *Noveck,* decided May 10, 1926, 46 S. Ct. 476, is decisive of the point that the three-year period of limitations prescribed in Section 1321 of the Revenue Act of 1921, *supra,* for "offenses arising under the internal revenue laws" can have no application to the case at bar.

In that case it was held that perjury, under Section 125 of the Penal Code, committed by making false oath to an income-tax return was not an offense arising under the internal revenue laws within the meaning of Section 1321 of the Revenue Act of 1921, *supra;* that hence the Act of November 17, 1921, *supra,* applied, but that as fraud is not an ingredient of the crime of perjury under the statute defining that offense the case fell within the three-year, rather than the six-year, period of limitations prescribed in said Act.

Other cases to the effect that a crime arises under the law by which it is defined and punished are *United States* v. *Hirsch,* 100 U. S. 33, and *United States* v. *Rabinowich,* 238 U. S. 78.

The reasoning in the *Noveck case* applies with full force to the case at bar. If the Act of November 17, 1921, applies to perjury it likewise applies to conspiracy. In the offense of conspiracy to defraud the United States of revenue, unlike perjury, under the rule of the *Noveck case,* the six-year period of the Act applies, because " defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense."

II

THE SIX-YEAR PERIOD OF LIMITATIONS PRESCRIBED BY THE ACT OF NOVEMBER 17, 1921, IS NOT LIMITED TO OFFENSES INVOLVING THE DEFRAUDING OF THE UNITED STATES GROWING OUT OF THE WAR

The second possible ground for the ruling of the court below is also readily disposed of. In the face of the specific provision that the period of limitations shall be six years in " offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner," it is idle to contend that Congress intended the Act of November 17, 1921, *supra,* to apply only to crimes growing out of the war.

The intent of Congress is so plain that nothing is left to construction. The rule that recourse may

not be had to legislative proceedings to vary the meaning of an unambiguous statute is too familiar and has too frequently been stated by this Court to require any extended citation. *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184; *Mackenzie* v. *Hare*, 239 U. S. 299.

Notwithstanding the unreliability of legislative proceedings in construing statutes, as a matter of fact the proceedings in Congress do not support the contention that the Act of November 17, 1921, *supra*, was intended to apply only to offenses growing out of the war. On the contrary, it appears clear (R. 15–31) that Congress was well aware and well informed of the scope and purpose of the Act and that the language employed was designed to cover all offenses involving the defrauding or attempting to defraud the United States, whether or not they grew out of the war. The "war frauds" furnished the occasion only for the enactment, not a measure of its scope.

The question, however, is really foreclosed by the opinion of this Court in *United States* v. *Noveck*, decided May 10, 1926, 46 S. Ct. 476. There, speaking of the Act of November 17, 1921, it is said:

> Its purpose is to apply the six-year period to every case in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense. There are several such offenses. Section 37 affords an illustration.

Section 37 is the section involved in this case.

III

SECTION 1010 OF THE REVENUE ACT OF 1924 HAS NO APPLICATION TO THE CASE AT BAR

The Government might well close here were it not probable that it will be urged upon this Court by defendants in error that the case at bar is affected by Section 1010 of the Revenue Act of 1924. Such is not the fact.

The indictment in this case was found on October 3, 1924. Prior to that time the existing statute of limitations (Section 1321 of the Revenue Act of 1921) for offenses "arising under the internal revenue laws" was reenacted as Section 1010 of the Revenue Act of 1924, *supra,* with the following apparently conflicting provisos:

> That no person shall be prosecuted, tried, or punished for * * * offenses arising under the internal revenue laws of the United States unless the indictment is found * * * within three years next after the commission of the offense: *Provided,* That for offenses involving the defrauding or attempting to defraud the United States * * * whether by conspiracy or not, and in any manner, the period of limitation shall be six years, *but this proviso shall not apply to acts, offenses, or transactions which were barred by law at the time of the enactment of the Revenue Act of 1924:* * * * *Provided further, That the provisions of this Act shall not*

apply to offenses committed prior to its passage * * *. (Italics ours.)

Should occasion require, the Government believes that by recourse to well-recognized rules of construction it would be possible to reconcile these apparently conflicting provisions, but that is unnecessary for the purpose of this case in view of the decision in *United States* v. *Noveck,* decided May 10, 1926, 46 S. Ct. 476.

As previously shown in Argument I of this brief, the *Noveck case* is conclusive of the proposition that the crime of conspiracy to defraud the United States does not " arise " under the internal revenue laws. Section 1010 of the Revenue Act of 1924 is confined to and applies only to the prosecution of offenses " arising under the internal revenue laws."

The words " whether by conspiracy or not " contained in a proviso of that section do not create a new substantive offense of conspiracy to defraud the United States of its internal revenue. The phrase is in a statute of limitations. Such a statute will not be construed as creating an offense separate and distinct from that defined by specific enactment. As stated by this Court in the *Noveck case,* " statutes will not be read to create crimes, or new degrees or classes of crime, unless the purpose so to do is plain."

Accordingly it is obvious that Section 1010 of the Revenue Act of 1924 can have no application to the case at bar. Its apparently conflicting provisos therefore do not concern us.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the District Court erred in holding that prosecution of the offense charged in the indictment in this case was barred by the statute of limitations. The judgment should be reversed and the cause remanded for trial.

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SEPTEMBER, 1926.

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